72-671 FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-671

CECILIA ESPINOZA and RUDOLFO ESPINOZA,

Petitioners,

v.

FARAH MANUFACTURING CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND REGULATIONS

Table of Other Authorities

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on May 31, 1972.

Citation to Opinions Below

The opinion of Judge Suttle granting plaintiff's motion for summary judgment appears in the Appendix, *infra*. The opinion of the Circuit Court of Appeals and the denial of the petition for rehearing are reported in 462 F. 2d 1331 and appear in the Appendix, *infra*.

Jurisdiction

The judgment of the Fifth Circuit Court of Appeals was entered on May 31, 1972. Petitions for rehearing and for rehearing en banc were denied on July 21, 1972. On October 11, Mr. Justice Powell extended the time for filing a petition for certiorari to and including October 31, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes and Regulations Involved

1. The federal statute involved is § 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), which provides:

> "It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

2. The regulation involved is an Equal Employment Opportunity Commission guideline on discrimination because of national origin, 29 C.F.R. § 1606.1(d). This regulation provides:

> "Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in the country may not be discriminated against on the basis of his citizenship, except that it is not an unlawful employment practice for an employer, pursuant to section 703(g), to refuse to

employ any person who does not fulfill the requirements imposed in the interests of national security pursuant to any statute of the United States or any Executive order of the President respecting the particular position or the particular premises in question."

Question Presented

Whether an employer's admitted policy of excluding resident aliens from employment constitutes a violation of the prohibition against discrimination on the basis of national origin contained in Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

Statement

This is an action brought by a lawfully admitted resident alien who was denied employment because she is not a United States citizen.

The Petitioner, Mrs. Cecilia Espinoza lives in San Antonio, Texas with her husband, a United States citizen. On or about July 19, 1967, the Petitioner applied for employment at Respondent's San Antonio plant. The Respondent refused to consider her application because she is not a United States citizen. None of the above stated facts are disputed.

After filing a charge of discrimination with the Equal Employment Opportunity Commission and receiving a Notice of Right to Sue (29 C.F.R. § 1601.25b(d)), Mrs. Espinoza brought this civil action. The Regional Director of the EEOC issued Findings of Fact indicating that the Respondent's policy has been to reject non-citizen applicants, that no reason was given for the existence of this policy, and that there is no national security justification

for the policy. Supplemental Appendix in the Fifth Circuit, pp. 42-43.

The District Court granted Petitioner's Motion for a Summary Judgment, holding that Respondent Farah Manufacturing Company's admitted policy of refusing to hire resident aliens constituted discrimination on the basis of national origin as prohibited by Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). On appeal, the Court of Appeals for the Fifth Circuit reversed.

Reasons for Granting the Writ

The decision below should be reviewed because its unreasonable interpretation of the term "national origin" threatens to thwart the basic purpose of Title VII and to leave unprotected the group perhaps most in need of protection against employment discrimination. It is, moreover, inconsistent with other recent decisions of this Court and general Federal policy expressed in related statutes.

I.

The decision below is a clearly and seriously erroneous interpretation of Title VII which deprives a critical and vulnerable group of the protections which the law should offer to them.

The issue posed by this case is a very simple one: yet it has a major impact in determining whether a key minority group will be given the protection which Title VII offers. This minority group is resident aliens. The history of these aliens—Irish, Chinese, Italian, Jew and Mexican alike—has been a history of discrimination, and in par-

ticular, job discrimination. The warning "None need apply but Americans" in Boston newspapers of the mid-1800's[1] was not an isolated event in American history. This was the typical pattern of immigrant treatment which persisted for each group until it became assimilated.[2]

The Farah Manufacturing Company will not hire immigrants unless and until they become citizens. Mrs. Espinoza, the petitioner here, is a lawful resident alien. She is the wife of an American citizen. Farah's policy is, therefore, not concerned with fears of becoming implicated in illegal immigration. Nor is there any other business justification advanced for Farah's practices; indeed the Fifth Circuit strongly suggested that the practice was arbitrary in terms of business needs.[3] The practice is plainly and

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[1] O. Handlin, *Boston's Immigrants* 62 (1959).

[2] "For want of alternative, the immigrants [during the late 1800's] took the lowest places in the ranks of industry. They suffered in consequence from the poor pay and miserable working conditions characteristic of the sweatshops and homework in the garment trades and in cigar making. But they were undoubtedly better off than the Irish and Germans of the 1840's for whom there had been no place at all.

* * *

Escape from the ranks of unskilled labor was, however, not easy and became steadily more difficult. The want of skill and capital was always a handicap. *But, in addition, discrimination against the newer ethnic groups grew even more intense, especially after the turn of the century.*"

O. Handlin, *The Newcomers* 24 (1959) (emphasis added.)

See generally, Reports of the Immigration Commission, 61st Cong., 3d Sess., Senate Doc. No. 747 (1911), especially Vol. XIX, p. 209, Table 74, (occupational disadvantage of foreign-born); Vol. I, p. 394, Table 42, p. 401, Table 48 (pay disadvantage of foreign-born in same jobs as native born); Vol. I, pp. 683-687 (particularly bad situation of Mexican aliens).

[3] "Quite obviously, a great host of arbitrary and discriminatory employment practices, far too numerous to mention, remain unchecked and unhampered by the Act. We hold that refusal to hire non-citizens is one of them." 462 F.2d at 1334.

simply an open prejudice against aliens. That bald fact is admitted on the record.[4]

It is of course true that Farah's discrimination against aliens is not in one sense "national origin" discrimination because Farah does not discriminate against all Mexicans or Italians—only against non-citizen ones. The Fifth Circuit focused on this point and upheld Farah's practice by reading Title VII rigidly and holding that only discrimination against all members of a particular national origin group would invoke the law.

This interpretation is wholly unsound; it is an unreasonable reading of the statute which exhibits a misunderstanding of the nature of national origin discrimination; it is a reading which would undermine the goals of the statute; and it is a reading which contradicts the EEOC's interpretation of the statute. There is nothing in the legislative history of Title VII that compels or even suggests the interpretation of the Fifth Circuit. That interpretation must be promptly repudiated to assure that this critically vulnerable alien group is not left isolated from Title VII's protection.

A. *The Fifth Circuit Interpretation is an Unreasonable Reading of the Statute.*

First, the Fifth Circuit gave an absurd construction to statute because it failed to recognize that Farah's discrimination is nothing but a variation on the same prejudice, the same chauvinism and refusal to consider individuals on their merits, which has always been the essence of national origin discrimination. National origin discrimination is traditionally rationalized on grounds of patriotism

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[4] See Supplemental Appendix in the Fifth Circuit, p. 62; Appendix in the Fifth Circuit, p. 45 at Answer to Interrogatory No. 21.

and national loyalty, but when stripped of that mask it comes down to antagonism to people who are not "American" enough to satisfy the employer. By discriminating against aliens solely because they lack the American credential of citizenship, Farah is doing exactly what national origin discriminators have always done, and Title VII should be read reasonably to cover such practices.

The legislative history of Title VII gives no indication of what Congress meant by "national origin" discrimination, leaving the courts free to adopt whatever interpretation most accords with the purpose of the statute.[5] One interpretation, admittedly, is that which the Fifth Circuit adopted: only specific discrimination against all members of specific nationality groups is "national origin" discrimination. But another interpretation is that "national origin" discrimination was addressed at a particular form of narrow-mindedness: the refusal to hire people who, because of their national origins and without regard to individual qualifications, are not totally "American." Given other prohibited kinds of discrimination—racial, religious—it is clear that protection of persons outside the white American male norm was the major thrust of Title VII. It seems only sensible to interpret "national origin" in the way most consistent with those other provisions.

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[5] The only definition of "national origin" in the legislative history that the Fifth Circuit was able to cite, and the only one that we have been able to find through our own extensive research is a brief quote from Representative Roosevelt:

> "May I just make [very] clear that 'national origin' means national. It means the country from which you or your forebears came from." 110 Cong. Rec. 2548-49 (1964) as quoted in 462 F.2d at 1333.

This comment, in a context where the Congressman was simply attempting to distinguish "national origin" from "race", can hardly be said to be authoritative or even very relevant to the issue posed by this case.

Following this approach, discrimination against aliens is national origin discrimination because of nonconformity to the standard American citizenship norm. There is only one significant reason why a person living in the United States will not be a citizen—that is because he was born outside this country. The native-born are automatically citizens. Therefore, discrimination on grounds of alienage is discrimination based on a direct and inevitable consequence of foreign origins. Discrimination against aliens qua aliens is therefore discrimination because of national origin.

This Court has consistently interpreted Title VII in a reasonable way to best carry out its ultimate purposes, because that is the accepted judicial approach to a remedial statute of this nature. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Love* v. *Pullman Co.*, 404 U.S. 522 (1972); *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971). The Fifth Circuit's refusal to interpret "national origin" consistently with these earlier Supreme Court decisions, and to interpret it in the way which would be most consistent with other clauses of the statute and which would give the statute maximum effectiveness, is a serious error which would promptly be put aright.

B. *The Effect of the Fifth Circuit Interpretation Would Be to Undermine the Goals of the Statute.*

We have just indicated that Farah's practice should be declared unlawful because the practice is based on an invidious and unlawful intent to engage in discrimination against a group having foreign national origins. But, intent is not the only basis for striking down practices under Title VII; the effects of the practices are also critical. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

Here the effects of Farah's practices are, if anything, even more invidious than the intent. The Fifth Circuit

interpretation would, in effect, permit an employer to escape responsibility for national origin discrimination by limiting his discrimination to those persons who are most recently and most obviously of foreign extraction, while hiring more assimilated, and therefore more acceptable, foreigners. It is incredible to think that Congress meant Title VII to protect those of foreign extraction who do not need protection, while excluding those who most need it, yet that is precisely what the Fifth Circuit rule does. It permits Farah to escape liability for its refusal to hire Mrs. Espinoza because it is willing to hire other Mexicans who have become citizens.

The basic error in the Fifth Circuit's reasoning in this respect is that it simply ignores that fact that aliens are, by definition, persons of foreign national origin. The impact of discrimination against aliens as a group obviously and necessarily falls on the foreign born, which means that those with immediate foreign national origin are those who suffer. The reason why the Fifth Circuit fell into this trap of permitting discrimination against those most obviously within the scope of the statute's protection is that it mistakenly lumped together all persons who are "derived" from a particular country as a single national origin group, and measured discrimination by the employer's willingness to hire from that group. This concept of national origin discrimination focuses on ancestry rather than ethnicity. However, it is not the home of a person's ancestors which triggers national origin discrimination in the United States, but rather it is the visible signs of national origin—language, customs, dress, and the like. National origin discrimination is ethnicity discrimination, and the more ethnically different a person is, the more vulnerable he is to this form of discrimination.

The attainment of citizenship is a rough indicator of assimilation. The requirements for it are in large measure tests of the degree to which a person has adjusted to American society. Knowledge is required of English language, American history and American government.[6] Thus, by the time an individual has acquired citizenship, he is well on his way to being absorbed into American society and to that extent, on the way to being free of discrimination. Moreover, he has acquired the tools, most notably language skills, needed to make his way in America. On the other hand, as the most recent and least assimilated of foreigners, aliens are most likely to be different and therefore most subject to national origin discrimination and they are least able to cope with the burdens of the discrimination. Yet, the Fifth Circuit interpretation allows an employer to openly discriminate against this most vulnerable group if he is willing to hire others of foreign extraction who are more assimilated and therefore less vulnerable.

The effect of Farah's employment policy in San Antonio is obvious. In an area where alien Mexicans constitute the principal immigrant group,[7] Farah's policy serves to exclude those individuals of Mexican origin whose ethnic identification is strongest. In essence, Farah, by a neutrally-phrased policy, is screening out persons with high degrees of ethnicity, achieving results similar to those gained by an employer discriminating on the basis of observed characteristics. While hiring some persons of Mexican origin, Farah by its policy rejects those who are most appropriate for statutory protection.

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[6] See 8 U.S.C. 1423; Annual Report, Immigration and Naturalization Service 20-21 (1971).

[7] In San Antonio, where Farah's plant is located, 1,479 of a total 1,927 admitted aliens are Mexican. Annual Report, Immigration and Naturalization Service 50, Table 12 A (1971).

C. *The Fifth Circuit Interpretation Rejects the Official Position of the Equal Employment Opportunity Commission. (EEOC)*

This Court has recognized that the interpretations given Title VII by the EEOC are entitled to "great deference", because of the obvious agency expertise in resolving ambiguities so as to best carry out the purposes of the statute. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433 (1971).

Here the EEOC's position is plainly expressed in its Guidelines on Discrimination because of National Origin, 29 C.F.R. §1606.1(d). According to these Guidelines it is unlawful to discriminate against a lawfully immigrated alien on the basis of citizenship except where national security justifications exist. Moreover, the EEOC has made clear its firm support of this Guideline as applied to the instant case. The EEOC appeared as amicus curiae in the Fifth Circuit strongly urging that Farah's practices be declared unlawful. When that view was not adopted, the EEOC petitioned for rehearing, urging even more vigorously that the Fifth Circuit rule would have serious adverse effects on the implementation of Title VII.

The Fifth Circuit recognized that the EEOC position was contrary to its decision but decided to reject the EEOC arguments. Such a rejection of agency views is appropriate only if the agency is plainly wrong, yet the Fifth Circuit could cite no clear legislative history or other source of authority for holding that the EEOC position was not a reasonable interpretation of the law.[8] On this ground alone, the Fifth Circuit decision was obviously wrong and contrary to the views of the Court as laid down in *Griggs* v. *Duke Power Co., supra.*

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[8] See note 5, *supra.*

II.

The Fifth Circuit decision is directly contrary to the previous decision of this Court in *Phillips* v. *Martin-Marietta Corp.*

In *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971), this Court was confronted with a sex-discrimination situation issue identical to the national origin discrimination issue raised in this case. The employer in *Phillips* refused to hire women with pre-school children, but claimed that he was pure in the eyes of the law because he freely hired other women. Indeed, 75-80% of those hired in the position applied for by Mrs. Phillips were women. 400 U.S. at 543. This was the so-called "sex-plus" defense—that it was permissible to refuse to hire women with special characteristics, so long as the refusal did not extend to all women. The Court rejected this defense unanimously, ruling that "sex-plus" was discrimination nonetheless under Title VII.

Here Farah is claiming that its refusal to hire Mrs. Espinoza is permissible because it does not extend to all Mexicans. Rather it covers only Mexicans who are not citizens and thus it is "national origin-plus" discrimination. But if "sex-plus" is unlawful, so too is "national origin-plus", and the Fifth Circuit decision should be reversed on the authority of *Phillips* v. *Martin-Marietta*.

III.

The Fifth Circuit decision is inconsistent with recent decisions giving aliens protected status under the Fourteenth Amendment.

Takahashi v. *Fish and Game Comm.*, 334 U.S. 410 (1948) and *Graham* v. *Richardson*, 403 U.S. 365 (1971) have clearly established that classifications based on alienage are inherently suspect and subject to special judicial scrutiny. Writing for the Court in *Graham*, Mr. Justice Blackmun emphasized that

> "Aliens as a class are a prime example of a 'discrete and insular minority . . . for whom . . . heightened judicial solicitude is appropriate.'" 403 U.S. at 372.

While these rulings under the Fourteenth Amendment have no binding effect under Title VII, it should be obvious that the same considerations which underlie the Court's definition of suspect classes under the Constitution also underlie the Congress' definition of protected classes under Title VII. Race is the basic protected class in both instances, and in both instances other groups with similar vulnerability have also been brought in. While exact parallels between the scope of the Fourteenth Amendment and Title VII are not to be expected, certainly the "judicial solicitude" which supported the *Graham* decision ought not be transformed into a judicial harshness when the courts turn to Title VII, which is the private employment analog of the Fourteenth Amendment. Yet the Fifth Circuit decision is plainly as insolicitous of the interests of aliens as it can be. If the policy and attitudes supporting *Graham* are given any sway at all in interpreting Title VII, discrimination against aliens would surely be viewed as a form of forbidden national origin discrimination.

IV.

The Fifth Circuit decision interprets Title VII in a manner inconsistent with federal policy expressed in the immigration laws.

Federal immigration laws express a clear concern with assuring the employability of aliens. "Aliens who are paupers, professional beggars, or vagrants" are excluded from admission to the United States [8 U.S.C. § 1182 (a)(4)], as are aliens who are likely to become public charges [8 U.S.C. § 1182(a)(15)]. Aliens shall be deported who have "within five years of entry become a public charge from causes not affirmatively shown to have arisen after entry" [8 U.S.C. § 1251(a)(8)], and an alien likely to become a public charge may be admitted upon the posting of a bond [8 U.S.C. § 1183]. Most importantly, 8 U.S.C. § 1182(a)(14) excludes aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor unless the Secretary of Labor has determined that (a) there are not sufficient workers in the United States at the appropriate time and place who are "able, willing, qualified and available" to perform such labor and that (b) "the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. . . ." The conclusion is inescapable that those aliens who are admitted into the United States are expected to be employed.

The interpretation which petitioners urge would permit Title VII to support and assist this important national policy. The Fifth Circuit decision, on the other hand, renders Title VII ineffectual against private employers who act so as to undermine immigration policy.

CONCLUSION

The decision below is an unreasonable interpretation of Title VII which deprives a critical minority of the statute's protection. This decision is inconsistent with prior Supreme Court decisions under Title VII and the Fourteenth Amendment and is inconsistent with national immigration policy. This Petition for Writ of Certiorari should be granted and the decision below promptly reversed.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-3364

Summary Calendar*

CECILIA ESPINOZA and RUDOLFO ESPINOZA,

Plaintiffs-Appellees,

versus

FARAH MANUFACTURING COMPANY, INC.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

(May 31, 1972)

Before:

BELL, DYER and CLARK,

Circuit Judges.

CLARK, Circuit Judge: This appeal requires us to decide which practices Congress intended to prohibit when it made it unlawful for an employer "to fail or refuse to hire

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*Rule 18, 5th Cir.; see *Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of N.Y.*, 431 F.2d 409, Part I (5th Cir. 1970).

. . . any individual . . . because of such individual's . . . national origin." 42 U.S.C.A. § 2000e-2 (a) (1). More precisely, we must determine whether the words "national origin" should be read to mean, or at least include, "citizenship." Since we conclude they should not; that none of the reasons offered for doing so will withstand close analysis; that this is one of those cases where Congress should be taken at its words; and that, put simply, "national origin" means exactly and only that, we reverse the judgment below.

The material facts are clear and undisputed. Cecilia Espinoza, plaintiff-appellee in this cause, is a lawfully admitted resident alien living in San Antonio, Texas with her citizen husband. In July 1969 she was refused employment at the San Antonio division of Farah Manufacturing Company, defendant-appellant, because she was not a United States citizen. This refusal was based upon a long-standing policy of the company, established by its founder for security reasons. The merits of such a policy are not at issue here, but rather we examine the company's right to enforce it in light of Title VII of the Civil Rights Act of 1964.

Subsequent to Farah's refusal of employment, Espinoza filed a charge with the Equal Employment Opportunity Commission, alleging that Farah had discriminated against her on the basis of her national origin—which is Mexican—in violation of Title VII. After making findings of fact, the EEOC, under provisions of the Act, authorized Espinoza to bring suit in federal court since no administrative solution to the complaint was forthcoming.

The EEOC Regional Director found, and the parties have never contested, that Espinoza was not denied employment because she is Spanish surnamed. Indeed, the

district judge found that "persons of Mexican ancestry make up more than 92% of defendant's total employees, 96% of its San Antonio employees, and 97% of the people doing the work for which plaintiff applied." The judge concluded that there was *no discrimination on the basis of ancestry or ethnic background.* Thus, this is not a case wherein an employer has feigned adherence to a policy which is no more than a subterfuge designed to conceal a brand of discrimination the Act prohibits. The record before us makes it unquestionable that Espinoza was denied an opportunity for employment because she lacks United States citizenship, and for no other reason.

The court below, upon motions for summary judgment by both sides, granted Espinoza relief by enjoining Farah from further refusal to hire her on the basis of her citizenship. This appeal followed.

We are keenly aware of the broad policy commitment of Title VII, and of the guarantee Congress made therein that "all persons within the jurisdiction of the United States" should have the opportunity for employment free from *specified kinds of discrimination.* It is in fact this court's duty "to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics." *Culpepper* v. *Reynolds Metal Company,* 421 F.2d 888, 891 (5th Cir. 1970). However, as Judge Bell remarked, though we approach the statute "in a generous way," we yet "want to stay within the intent of Congress in making it work." *Id.* at *n.* 3. Thus, while Farah's policy could be characterized as arbitrary and there is little doubt that Congress could have acted to prohibit its practice, the question remains: Has Congress so acted?

Appendix

Several general principles guide us in our construction of this statute. The first is that we not read it mechanically, *Miller* v. *Amusement Enterprises, Inc.*, 394 F.2d 342 (5th Cir. 1968), nor in a fashion so confined to the bare words that our literalism risks a strangulation of meaning. *Lynch* v. *Overholser*, 369 U.S. 705, 82 S.Ct. 1063, 8 L.Ed.2d 211 (1962). Here, there is no such risk. We find the words "national origin" to be entirely clear and unambiguous, both standing alone and in the context in which they appear in the statute.

In such a situation, a second well-settled principle provides that where the meaning of the words is plain, no resort need be had to legislative history. *United States* v. *Public Utilities Commission*, 345 U.S. 295, 314, 73 S.Ct. 706, 717, 97 L.Ed. 1020 (1953); Ex parte Collett, 337 U.S. 55, 61, 69 S.Ct. 944, 947, 93 L.Ed. 1207, 1211 (1949); *General Electric Company* v. *Southern Construction Company, Inc.*, 383 F.2d 135, 138 (5th Cir. 1967). *See also United States* v. *Bass*, 40 U.S.L.W. 4101, 4102 (U.S. Dec. 20, 1971). We have nevertheless considered the history of this section of the Act to be assured that Congress did not intend something entirely different from the normal meaning of the words they used. Our investigation lent not one iota of support for the interpretation Espinoza here urges. On the contrary, the single direct definition given to "national origin" in the history of the Act is completely consistent with the ordinary and expected import of those words:

> May I just make very clear that "national origin" means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country.[1]

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[1] 110 Cong. Rec. 2548-49 (1964) (remarks of Congressman Roosevelt, Chairman of the House Subcommittee reporting the bill).

Appendix

Espinoza was not denied a job because of her Spanish surname, her Mexican heritage, her foreign ancestry, her own or her parents' birthplace—all of which characteristics she shared with the vast majority of Farah's employees. Rather she was refused employment—irrespective of what her national origin may have been—because she had not acquired United States citizenship. Neither the language of the Act, nor its history, nor the specific facts of this case persuade us that such a refusal has been condemned by Congress.

It avails Espinoza naught to argue that by denying her relief we thwart the Act's general purpose of bringing to every man and woman in this country the opportunity to "provide for one's family in a job or profession for which he [or she] qualifies and chooses." *Culpepper, supra* at 891. Laudable though this objective may be, we have not the authority to declare unlawful any and all activities that might impede its effectuation. Quite obviously, a great host of arbitrary and discriminatory employment practices, far too numerous to mention, remain unchecked and unhampered by the Act. We hold that refusal to hire non-citizens is one of them. Though the general policy of the Act doubtless was to halt arbitrary employment practices, through the unmistakable words of the Act's actual text Congress has offered its conception of the specific spheres in which this general policy is to operate, and thereby has necessarily limited the policy's outreach. *See Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct., 1772, 26 L.Ed.2d 339 (1970).

There remain two other theories espoused by Espinoza as being supportive of her case. The first relies upon the text of an EEOC regulation which provides:

> Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship. . . .[2]

We agree that in many situations discrimination on the basis of citizenship would indeed be banned by the Act, *e.g.*, where such a practice is symptomatic of or a necessary element within prohibited national origin discrimination, or where it is a mere pretense to camouflage national origin discrimination. In such situations we would find this regulation enforceable as a proper effectuation of the Act. However, no such situation exists here. The parties are agreed that the citizenship discrimination in the case at bar was neither part of a larger plan, nor a cover-up for some other motive. Thus, to the extent such discrimination has been declared by the EEOC to be per se illegal, we refuse to follow its regulation. The "great deference" the Supreme Court has found to be due that agency's interpretation of the Act, *Griggs* v. *Duke Power Company*, 401 U.S. 424, 434, 91 S. Ct. 849, 855, —— L.Ed.2d ——, —— (1971), does not require a different result. In *Griggs*, the Court found that "(s)ince the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress." 401 U.S. at 434. Moreover, in that case the Court made an independent analysis of the pertinent legislative history and decided that "the conclusion is inescapable that the EEOC's construction . . . comports with Congressional intent." 401 U.S. at 436.

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[2] 29 C.F.R. § 1606.1 (d).

As previously discussed, we do not have before us analogous circumstances. While acknowledging deference is due, blind adherence is not.

The final theory Espinoza urges would have us penalize Farah's activity for being a classification "based on alienage" which "like those based on nationality and race" is "inherently suspect and subject to close judicial scrutiny." *Graham* v. *Richardson*, —— U.S. ——, ——, 91 S.Ct. 1848, 1852, —— L.Ed.2d ——, —— (1971). Certainly *state action* which discriminates against persons on the basis of their citizenship, or lack thereof, threatens to run afoul of the Fourteenth Amendment. *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948); *Truax* v. *Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 31 (1915); *Chapman* v. *Gerard*, 40 U.S.L.W. 2565 (3rd Cir. Feb. 28, 1972). Moreover, the original purpose clause for Title VII of H.R. 7152, 88th Cong., 2d Sess. § 701(a) (1964), provided that *"all persons* within the jurisdiction of the United States have a right to the opportunity for employment without discrimination on account of . . . national origin."[3] (emphasis added). Neither of these factors is of any aid to our construction of 42 U.S.C.A. §2000e-2 (a) (1). As to the state action cases, it should be noted that no constitutional attack is being made here; nor could there be.[4] What the state cannot constitutionally prohibit has

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[3] *See* H.R. Rep. No. 914, 88th Cong., 2d Sess., 2 U.S.C. Cong. Admin. News, p. 2401 (1964).

[4] We do not understand Espinoza to contend that this statute would be constitutionally suspect for *failing* to prohibit discrimination against aliens. Obviously, such an argument would be without merit. Williams v. Lee Optical Company of Oklahoma, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563, 573 (1955); Stone v. City of Maitland, —— F.2d —— (5th Cir. 1971) [No. 30474, Aug. 4, 1971]; E. B. Elliot Advertising Co. v. Metropolitan Dade County, 425 F.2d 1141, 1155 (5th Cir. 1970).

no relationship to what a private individual can constitutionally practice. Regarding the purpose clause's "all persons" provision, it need only be said that the fact all persons are protected by the Act gives no definition to what they are protected from. As a person within this country's jurisdiction, Espinoza is unquestionably protected against discrimination based upon race, color, religion, sex, or national origin. Having found no persuasive reasoning to upset the ordinary meaning of the last of these five prohibitions, *see Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 88 S.Ct. 1140, 20 L.E.2d 30 (1968), *reh. denied* 391 U.S. 929, 88 S.Ct. 1800, 20 L.Ed.2d 671, we conclude that Espinoza was not entitled to relief and that the summary judgment granted in her behalf must be

REVERSED.

Appendix

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(July 21, 1972)

Before:

BELL, DYER and CLARK,

Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Appendix

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

SA-70-CA-353

CECILIA ESPINOZA ET VIR

v.

FARAH MFG. CO., INC.

MEMORANDUM OF DECISION

This is a civil action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Both sides have moved for Summary Judgment on the issue of violation, and the Court, having considered the pleadings, motions, briefs in support thereof, and comments of counsel, finds and rules as follows:

The material facts are undisputed. Named plaintiff is a lawfully admitted resident alien living in San Antonio, Texas, with her citizen husband. Defendant is a manufacturer of clothing and is an "employer" within 42 U.S.C. § 2000e(b). On or about July 19, 1969, plaintiff was refused employment at defendant's San Antonio facility because she was not a citizen of the United States. The Regional Director, Equal Employment Opportunity Commission, confirmed the reason for refusal, finding no evidence "that Respondent refused to employ Charging Party

because she is Spanish Surnamed."[1] Indeed, persons of Mexican ancestry make up more than 92% of defendant's total employees, 96% of its San Antonio employees, and 97% of people doing the work for which plaintiff applied, negating discrimination on the basis of ancestry or ethnic background. Defendant has, however, and will continue to employ only citizens of the United States.[2]

Congress has declared it unlawful for an employer "to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(1). The sole issue presented by the mutual Motions for Summary Judgment is whether a refusal to hire because of citizenship alone was prohibited as discrimination on the basis of "national origin." The Court holds that it was and is.

Defendant argues that the Act's failure to simply include "citizenship" as a prohibited classification must be viewed, in light of the careful consideration shown by the legislative history, as evidence of an intent to exclude it. See 2 U.S.C. Cong.&Admin.News pp. 2355 *et seq.* (1964). The Court finds the legislative history equally consistent with its view that alienage is included in "national origin" and, indeed, is elsewhere specifically excluded from coverage in employment "outside any State." 42 U.S.C. § 2000e-1.

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[1] The Director found and defendant confirms that its rejection of applicants for employment who are not citizens of the United States is based upon a long-standing policy established by its founder and that there is no national security justification for its policy.

[2] While the acquisition of Tex Mfg. Co. by defendant in June, 1971, resulted in its absorbing approximately 300 non-citizen employees who will not be discharged, the policy will be enforced with regard to new applications. See Defendant's Amended Answer to Plaintiff's First Set of Interrogatories, filed May 10, 1971.

Appendix

The original purpose clause for Title VII of H.R. 7152, 88th Cong., 2d Sess. § 701(a) (1964), declared that "*all persons within the jurisdiction of the United States* have a right to the opportunity for employment without discrimination on account of . . . national origin." See H.R. Rep. No. 914, 88th Cong., 2d Sess., 2 U.S.C. Cong.&Admin. News p. 2401 (1964) (Emphasis added). The Equal Employment Opportunity Commission, having enforcement responsibility, has issued a guideline on discrimination because of national origin providing as follows:

> "Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully imigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship, ..."

29 C.F.R. § 1606.1(d) (1971). This interpretation is supported by the Act and its Legislative history and is entitled to great deference. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971).

Defendant argues that in order to correctly express the will of Congress "citizenship" and "national origin" must be distinguished and the first word of the above quoted guideline must be changed from "because" to "when." This Court disagrees. While "citizenship" and "nationality" may have different technical meanings, the term "national origin" is broad enough to encompass both. It is clear that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971) (Footnotes omitted). Like racial, sexual, or religious discrimination in employment, citizenship discrimination deals with

> ". . . the ability to provide decently for one's family in a job or profession for which he qualifies and chooses. Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics."

Culpepper v. *Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970) (Footnote omitted). For the Court to engage in the semantic battle fought by defendant, and to strictly construe "national origin" to exclude and permit employment discrimination on the basis of citizenship, would do violence to Congress's intent. By 42 U.S.C. § 2000e-2(a)(1) Congress meant to prohibit all invidious employment discrimination on the basis of national origin, including national ancestry, ethnic heritage, nationality and citizenship.[3]

Defendant points to the federal government's civil service policies which, while prohibiting discrimination on the basis of "national origin," limits employment to citizens of the United States. *Compare* 5 U.S.C. § 7151; Exec. Order No. 11478, 34 Fed. Reg. 12985 (1969), as amended, Exec. Order No. 11590, 36 Fed. Reg. 7831 (1971); *with* Federal Personnel Manual Supplement 990-1, § 338.101 (1969). But

[3] England's Race Relations Act of 1968 has been so construed by Swanwick, J., holding that the Act's prohibition of discrimination on the ground of "national origins" required invalidation of a London Borough rule stipulating that an applicant for housing must be a British citizen. *London Borough of Ealing* v. *Race Relations Board* [1971] 1 All E.R. 424, noted by Zellick, *The Meaning of "National Origins,"* 121 The New Law Journal 341 (1971).

whatever federal executive policy in governmental employment,[4] Congressional policy regarding employment in interstate commerce is clear. It is to prohibit invidious discrimination based upon national origin, including citizenship or alienage. Congress has, pursuant to its broad constitutional powers to determine the conditions of entry and residence of aliens in the United States, provided a comprehensive plan for regulation of immigration and naturalization, including limitations designed to insure that aliens admitted will become a productive part of our society. See *Graham* v. *Richardson, supra* at 377. It is inconceivable that Congress would then, in equally comprehensive legislation pursuant to its broad constitutional powers to regulate interstate commerce, permit these aliens to be denied employment because not citizens. To the contrary, it was this, among other invidious employment discriminations, based upon "inherently suspect classifications," which Congress intended to, and the Courts must, prohibit.

In summary, the material facts are undisputed. Defendant intentionally refused to hire plaintiff because plaintiff was not a citizen of the United States. As a matter of law, this was a refusal to hire an individual "because of such individual's . . . national origin," and, hence an unlawful employment practice under 42 U.S.C. § 2000e-2(a)(1). While clearly not malicious, the intent with which defen-

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[4] The government is excluded from coverage under 42 U.S.C. § 2000e(b)(1), and the validity of this regulation is not before the Court. Similar State requirements may be questionable under the Equal Protection Clause; see *Graham* v. *Richardson, supra* at 374, citing *Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 410 (1948); and/or the Supremacy Clause. See 29 C.F.R. § 1606.1(e); *cf., Local 246* v. *Southern Calif. Edison Co.*, 320 F.Supp. 1262 (C.D. Calif. 1970).

dant has and is engaging in this practice is sufficient to justify injunctive relief. *Local 189* v. *United States,* 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970); see 42 U.S.C. § 2000e-5(g). It is, therefore ORDERED as follows:

1. Defendant's Motion for Summary Judgment is, hereby, in all things, denied.

2. Plaintiff's Motion for Summary Judgment is, to the extent reflected above and in the Judgment to enter, granted, and, to the extent requesting additional relief not herein designated, denied.

3. Judgment shall issue declaring that defendant's refusal to hire plaintiff was an unlawful employment practice and enjoining defendant from further engaging in such unlawful employment practice.[5]

4. The Court will direct further proceedings as may be necessary to determine any additional relief, not herein specifically granted, prayed in Petitioners' Second Amended Complaint, to which plaintiff may be entitled.

Entered this 21st day of September, 1971.

D. W. SUTTLE
United States District Judge

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[5] While this is a partial summary judgment under Rule 56(d), F.R.Civ.P., and hence interlocutory, it would appear appealable as inescapable from the granting of the permanent injunction, which is clearly appealable under 28 U.S.C. § 292(a)(1). See *Teamsters* v. *Braswell Motor Freight Lines, Inc.,* 428 F.2d 1371, 1373 n.3 (5th Cir. 1970).